MICHIGAN SUPREME COURT

Office of Public Information

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BEACH USE CASE TO BE HEARD BY MICHIGAN SUPREME COURT; WAYNE STATE LAW SCHOOL IS SETTING FOR SECOND DAY OF ORAL ARGUMENTS

LANSING, MI, March 3, 2005 – Do Michigan's waterfront property owners have exclusive access to their property up to the water's edge, or may members of the public walk along privately-owned beaches? That is the issue the Michigan Supreme Court will consider when it hears oral arguments in *Glass v. Goeckel* next week.

The plaintiff in *Glass* has appealed to the Supreme Court to overturn the Michigan Court of Appeals' decision in the case. The Court of Appeals ruled that members of the public have the right to walk along private property as long as they remain in the water. But where dry land begins, the property owners have exclusive rights and may bar access to the beach, the appellate court said.

Also before the Court are *People v. Knight* and *People v. Rice*, in which the two defendants, who were tried in a joint jury trial, appeal from their convictions for first-degree murder. During jury section, the prosecutor excluded various African-Americans from the jury on the basis of peremptory challenges. An attorney may use a limited number of peremptory challenges to remove a potential juror without giving a reason, as opposed to challenges for cause, in which the attorney does have to explain to the court why a juror should be excluded. When defense counsel objected, the trial court called on the prosecution to explain the challenges, but was not satisfied with the prosecutor's stated reasons for challenging two of the jurors. After a deputy was unable to locate the two jurors and bring them back to the courtroom, the judge concluded that any discrimination on the prosecutor's part was cured by the fact that there were still African-American jurors on the panel. The defendants contend that the prosecutor's actions violated state and federal constitutional guarantees of equal protection.

The Court will also hear *County Road Association of Michigan v. Governor of Michigan.* At issue is whether the Governor may move funds designated for public transit to the state's general fund. The state constitution provides that 90 percent of fuel sales taxes are to be used for highway construction and maintenance; the remaining 10 percent to the state's Comprehensive Transportation Fund, which finances public transit systems throughout Michigan. The Michigan Court of Appeals has ruled that the Michigan Constitution did not bar then-Governor John Engler from moving monies raised through fuel sales taxes to the general fund; the move was part of an effort to balance the state's budget.

The Court will hear eight other cases, involving medical malpractice, criminal, insurance, and election law issues.

Court will be held on **March 8 and 9.** Court will convene at **9:30 a.m.** each day. The March 8 oral arguments will be heard in the Supreme Court courtroom on the sixth floor of the Michigan Hall of Justice, located at 925 W. Ottawa in Lansing. On March 9, the Court will hold oral arguments at the Spencer M. Partrich Auditorium on the campus of Wayne State University Law School.

(Please note: The summaries that follow are brief accounts of complicated cases and may not reflect the way in which some or all of the Court's seven Justices view the cases. The attorneys may also disagree about the facts, the issues, the procedural history, or the significance of their cases. Briefs in the cases are available on the Supreme Court's website at http://courts.michigan.gov/supremecourt/Clerk/msc_orals.htm. For further details about the cases, please contact the attorneys.)

Tuesday, March 8
Morning Session

TOWNSHIP OF CASCO, et al. v. SECRETARY OF STATE, et al. (case no. 126120)
Attorney for plaintiffs Township of Casco, Township of Columbus, Patricia Iseler, and James P. Holk: William K. Fahey/(517) 371-8150
Attorney for defendants Secretary of State and Director of the Bureau of Elections: Patrick J. O'Brien/(517) 373-6434
Attorney for defendant City of Richmond: Eric D. Williams/(231) 796-8945
Attorney for intervening defendants Walter K. Winkle and Patricia A. Winkle: Robert J. Pineau/(313) 961-0200
Attorney for amicus curiae Michigan Municipal League: William B. Beach/(313) 963-6420
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
FILLMORE TOWNSHIP, et al. v. SECRETARY OF STATE, et al. (case no. 126369)
Attorney for plaintiffs Fillmore Township, Shirley Greving, Andrea Stam, Larry Sybesma, Jody Tenbrink, and James Rietveld: William K. Fahey/(517) 371-8150
Attorney for defendants Secretary of State and Director of the Bureau of Elections: Patrick J. O'Brien/(517) 373-6434
Attorney for intervenor City of Holland: Andrew J. Mulder/(616) 392-1821
Attorney for amicus curiae Michigan Townships Association: John H. Bauckham/(269) 382-4500
Trial court: Ingham County Circuit Court (126120); original Court of Appeals action (case no. 126369)
At issue: Under the Home Rule Cities Act (HRCA), can territory be detached from one city and transferred to more than one township in a single detachment election?
Background: These two cases involve townships' attempts to increase their boundaries by detaching land from a nearby city. As required by the Home Rule Cities Act (HRCA), residents of the affected areas submitted petitions to the Secretary of State calling for a detachment

election. Each of the proposed detachment elections would involve multiple townships that are seeking to detach land from a single city. In both instances, the Secretary of State refused to accept the petitions, because the proposed election was not restricted to the voters of a single city (that would lose land as a result of the proposed detachment) and a single township (that would gain land as a result of the proposed detachment). Both the Secretary of State and the Court of Appeals majority concluded that the HRCA does not permit this type of election, in which citizens of one township would be allowed to vote on issues that affect another township, and in which the townships' combined voting strength could be used to overwhelm the city's voting strength. A dissenting judge in the Court of Appeals concluded that such an election was not prohibited by the HRCA. The plaintiff townships seek leave to appeal, asking the Supreme Court to compel the Secretary of State to approve their petitions and initiate the election process.

GLASS v. GOECKEL, et al. (case no. 126409)
Attorney for plaintiff Joan M. Glass: Pamela S. Burt/(989) 724-7400
Attorney for defendants Richard A. Goeckel and Kathleen D. Goeckel: Scott C. Strattard/(989) 498-2100
Attorneys for amicus curiae Defenders of Property Rights: Allan Falk/(517) 381-8449, Nancie G. Marzulla/(202) 822-6770
Attorneys for amicus curiae Michigan Chamber of Commerce, National Federation of Independent Business Legal Foundation, Michigan Bankers Association, and Michigan Hotel, Motel and Resort Association: Frederic N. Goldberg, William A. Horn, Ronald M. Redick/(616) 632-8000
Attorney for amicus curiae Michigan Land Use Institute: James A. Gray, III/(313) 225-7000
Attorney for amicus curiae National Wildlife Federation and Michigan United Conservation Clubs: Noah D. Hall/(734) 769-3351
Attorney for amicus curiae Save Our Shoreline and Great Lakes Coalition, Inc.: David L. Powers/(989) 892-3924
Attorney for amicus curiae Tip of the Mitt Watershed Council: Chris A. Shafer/(517) 371-5140
Attorney for amicus curiae Michigan Senate Democratic Caucus: John William Mulcrone/(517) 373-9857
Trial court: Alcona County Circuit Court
At issue: This case will determine the extent of private title ownership at the beaches of the Great Lakes, and the public's right to use such beaches throughout the state of Michigan. Can the public use that part of the shore that lies below the natural high-water mark, or is that land reserved for the exclusive use of the landowner of the adjacent parcel? Is the land below the natural high-water mark owned by the landowner or the state?
Background: Richard and Kathleen Goeckel, the defendants, live on property that abuts the beach of Lake Huron, and Joan Glass, the plaintiff, lives across the road. Glass initiated the lawsuit, claiming to have a right-of-way to cross the Goeckels' property to reach the beach, and a right to use that part of the beach between the lake waters and the high-water mark. The parties eventually resolved the right-of-way issue, but could not agree on Glass's right to use the beach. The trial court determined that Glass had a right to use that part of the beach adjacent to the Goeckels' property for pedestrian travel, so long as she stayed below the high-water mark; it based its decision on the Great Lakes Submerged Land Act, MCL 324.32501 *et seq*. The Court of Appeals reversed, holding that the Goeckels, and other similarly situated owners, have an

exclusive right to use that part of the beach below the high-water mark that is adjacent to their property. But the court held that the state, and not the adjacent landowner, holds title to these lands. Glass appeals.

RORY, et al. v. CONTINENTAL INSURANCE COMPANY (case no. 126747)
Attorney for plaintiffs Shirley Rory and Ethel Woods: David D. Turfe/(586) 415-4900
Attorney for defendant Continental Insurance Company: Robert D. Goldstein/(810) 695-3700
Attorneys for amicus curiae Farm Bureau General Insurance Company of Michigan: John A. Yeager, Matthew K. Payok/(517) 351-6200
Attorney for amicus curiae Michigan Trial Lawyers Association: Robert B. June/(734) 481-1000
Attorney for amicus curiae Linda A. Watters, Commissioner of the Office of Financial and Insurance Services, Department of Labor and Economic Growth: David W. Silver/(517) 373-1160
Trial court: Wayne County Circuit Court
At issue: The plaintiffs' no-fault insurance policy states that a claim or suit for uninsured motorist benefits must be filed within one year of the accident. Is this provision reasonable and enforceable?
Background: On May 15, 1998, plaintiffs Shirley Rory and Ethel Woods were injured in an automobile accident. Defendant Continental Insurance Company was their no-fault insurer. On September 21, 1999, the plaintiffs sued the driver of the other vehicle, Charlene Denise Haynes, for damages. They eventually learned that Haynes was uninsured, and they notified Continental Insurance of their uninsured motorist claim on March 14, 2000 – more than a year after the accident. The Continental Insurance policy states that a claim or suit for uninsured motorist benefits must be filed within one year of the accident. Relying on this provision, Continental Insurance denied coverage, and Rory and Woods sued the company. Continental Insurance asked the trial court to resolve the coverage issue in its favor, noting that the policy required plaintiffs to make a claim or file suit within one year, and that the plaintiffs did not comply with this provision. The trial court denied Continental Insurance's request, finding that the uninsured motorist provision was unreasonable. The Court of Appeals affirmed the trial court's ruling. Continental Insurance appeals.

Afternoon Session

MAYBERRY, et al. v. GENERAL ORTHOPEDICS, P.C., et al. (case no. 126136)
Attorney for plaintiffs Keith W. Mayberry and Joanna Mayberry: Joseph J. Ceglarek, II/(248) 552-8500
Attorney for defendants General Orthopedics, P.C. and William H. Kohen, M.D.: James M. Pidgeon/(248) 649-4300
Trial court: Oakland County Circuit Court
At issue: MCL 600.2912b(6) requires a medical malpractice plaintiff to give notice before filing suit, and MCL 600.5856(d) allows the two-year limitation period to be tolled during the notice period, but only if necessary to prevent the statute of limitations from expiring. Does a plaintiff who files a "notice of intent" (NOI) at an early time, so that it is not necessary to toll the statute

of limitations during the notice period, receive the benefit of the tolling provision if a second NOI is filed during the last six months of the two-year limitation period?
Background: Plaintiffs Keith and Joanna Mayberry claim that defendant Dr. William H. Kohen negligently operated on Keith Mayberry's wrist on November 22, 1999. The parties agree that the Mayberrys' malpractice claim accrued on that date; accordingly, the two-year statute of limitations normally would have expired on November 22, 2001. MCL 600.2912b requires plaintiffs seeking to file a medical malpractice action to give presuit notice of their intent to sue ("NOI"); if the statute of limitations would expire during the statutory notice period, usually 182 days, then MCL 600.5856 tolls the limitations period. In this case, the plaintiffs mailed a NOI to Dr. Kohen only on June 21, 2000. The plaintiffs mailed a second NOI on October 12, 2001, which again named Dr. Kohen and added General Orthopedics, P.C. The second NOI was mailed about a month before the two-year limitation period expired. The plaintiffs allowed the notice period to elapse and then filed their complaint against both defendants on March 19, 2002. The plaintiffs' complaint was timely if their second NOI tolled the statute of limitations for 182 days. But the circuit judge found that the plaintiffs' complaint was not timely, and the lawsuit was dismissed. The plaintiffs appealed to the Court of Appeals, which affirmed the circuit judge's ruling. The plaintiffs now seek leave to appeal to the Supreme Court.

J & J FARMER LEASING, INC., et al. v. CITIZENS INSURANCE COMPANY OF AMERICA (case no. 125818)
Attorney for plaintiffs J & J Farmer Leasing, Inc., Farmer Brothers Trucking Co., Inc., Calvin Orange Rickard, Jr., and James W. Riley, as Personal Representative of the Estate of Sharyn Ann Riley, Deceased: James A. Iafrate/(734) 994-0200
Attorney for defendant Citizens Insurance Company of America: Jeffrey C. Gerish/(248) 901-4031
Attorneys for amicus curiae Insurance Institute of Michigan: John A. Yeager, Kara Henigan/(517) 351-6200
Trial court: Washtenaw County Circuit Court
At issue: A plaintiff won a wrongful death judgment against a leasing corporation; the judgment was paid in part by the corporation's insurer. The plaintiff then signed an agreement not to sue the defendant corporation to collect the unsatisfied portion of the judgment, on the condition that the defendant cooperated in another lawsuit that the plaintiff brought against the defendant's insurance company. The theory for this second suit was that the insurance company acted in bad faith by failing to settle the underlying case. What effect does the agreement have, if any, on the defendant's liability for the unsatisfied portion of the judgment? Under what circumstances can an assignment of a bad-faith claim allow the suit against the insurer to proceed?
Background: Sharyn Ann Riley was killed when a semitrailer and tractor swerved into the lane in which she was driving, colliding head-on with her vehicle. James Riley, as the personal representative of Sharyn Riley, sued Citizens' insured, J & J Farmer Leasing, under a wrongful death theory. The jury's verdict exceeded the limits of J & J's insurance policy with Citizens. After Citizens paid its policy limits, J & J remained liable for the balance of the judgment. Riley and J & J then agreed to bring a joint suit against Citizens, on the basis of the insurer's alleged bad-faith failure to settle the wrongful death action. Riley agreed not to sue J & J for the unsatisfied portion of the judgment as long as J & J cooperated in the suit against Citizens. Citizens argued that the lawsuit should be dismissed because the agreement between Riley and J & J constituted a release of J & J, and also a release of Citizens, J & J's insurer. The trial court

denied Citizens' motion, and the Court of Appeals affirmed the trial court's ruling. Citizens Insurance now seeks leave to appeal to the Supreme Court.

Wednesday, March 9 (*arguments to be held at the Spencer M. Partrich Auditorium, Wayne State University Law School, Detroit*)

Morning Session

PEOPLE v. STEWART (case no. 124055)
Prosecuting attorneys: A. George Best, II, Janet M. Boes/(989) 790-5330
Attorney for defendant Leonard Lamont Stewart: Carolyn A. Blanchard/(248) 305-9383
Attorney for amicus curiae Prosecuting Attorneys Association of Michigan: William M. Worden/(517) 543-7500
Trial court: Saginaw County Circuit Court
At issue: A prisoner who cooperates with law enforcement (i.e., provides useful information) can obtain earlier parole eligibility under MCL 791.234(10). What constitutes "cooperation" under the statute? Did the defendant satisfy the statute's requirements for "cooperation"?
Background: In 1995, defendant Leonard Stewart was convicted of possession with intent to deliver over 650 grams of cocaine. Several years into his prison term, he asked the trial court to certify that he cooperated with law enforcement and could be eligible for parole in 15 years instead of 17½ years, as set forth in MCL 791.234(10). The statute states that a "prisoner is considered to have cooperated with law enforcement if the [trial] court determines on the record that the prisoner had no relevant or useful information to provide." Stewart told the trial court that he had no relevant or useful information for law enforcement at the time of his arrest, because others involved in the drug enterprise had already shared their information with the police, but he also stated that he was ready and willing to share any relevant or useful information that he might have. The trial court found that Stewart did not cooperate within the meaning of the statute. Stewart asked the Court of Appeals to review the trial court's ruling, but the appellate court denied his request. Stewart appeals.

PEOPLE v. PERKINS (case no. 126727)
Prosecuting attorney: Frank J. Bernacki/(313) 224-5785
Attorney for defendant David Michael Perkins: Dawn A. Van Hoek/(313) 256-9833
Trial court: Wayne County Circuit Court
At issue: Is the restoration of firearm rights, addressed in the felon-in-possession statute at MCL 750.224f(2)(b), an affirmative defense? Or is the absence of restoration an element of the prosecution's case? Is larceny from a person a "specified felony" for purposes of the felon-in-possession statute, MCL 750.224f(6)(i)?
Background: On October 16, 2001, defendant David Perkins allegedly fired a weapon at Stanley Law. Perkins was charged with assault with a dangerous weapon and possessing a firearm during the commission of a felony. Because Perkins had previously been convicted of larceny from a person, he was also charged with being a felon in possession of a firearm, under MCL 750.224f. That statute states that a person convicted of a "specified felony" cannot use or possess a firearm until five years after that person has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense. The statute also states that, after the five-year period has passed, the convicted person is still prohibited from using or

possessing a firearm until his rights have been formally "restored." After a bench trial, the trial court acquitted Perkins of the assault charge, but convicted him of being a felon in possession of a firearm, and of possessing a firearm in the commission of that felony. Perkins appealed to the Court of Appeals, which affirmed the trial court's ruling. Concerning the felon-in-possession conviction, the appellate court held that larceny from a person is a "specified felony" under MCL 750.224f(6)(i). The appellate court also held that the prosecutor need not prove that a defendant's right to possess a firearm has not been restored unless the defendant first produces evidence that his right to possess a firearm has been restored. Perkins appeals.

CITY OF GROSSE POINTE PARK v. MICHIGAN MUNICIPAL LIABILITY & PROPERTY POOL (case no. 125630)
Attorney for plaintiff City of Grosse Pointe Park: R. Craig Hupp/(313) 259-2777
Attorney for defendant Michigan Municipal Liability & Property Pool: Thomas E. Daniels/(734) 483-3626
Trial court: Wayne County Circuit Court
At issue: Is sewage a "pollutant" under the pollution exclusion clause in the relevant insurance policy? Can the defendant rely on the exclusion in this case, even if it has paid similar claims, or is it estopped from asserting the exclusion?
Background: The City of Grosse Pointe Park was sued in a class action lawsuit for discharging sewage into Fox Creek in Detroit in July of 1995. Defendant Michigan Municipal Liability & Property Pool provided insurance coverage to the City under a commercial general liability policy. The City and the class action plaintiffs agreed to settle the lawsuit; the City informed Michigan Municipal of the settlement and asked it to cover the settlement cost. Michigan Municipal advised the City that the pollution exclusion clause in the insurance contract precluded coverage. The City went ahead with the settlement, and then sued to compel Michigan Municipal to reimburse it for the cost of the settlement. The trial court ruled in the City's favor, holding that Michigan Municipal was estopped from denying coverage. It entered judgment in the City's favor for more than $1.9 million. The Court of Appeals reversed on this point, finding a question of fact as to whether Michigan Municipal was estopped from denying coverage. The appellate court remanded the case to the trial court for further proceedings. Michigan Municipal appeals to the Supreme Court. The lower courts erred in considering evidence of how Michigan Municipal handled other sewer backup claims, Michigan Municipal contends. The defendant also argues that the damages the City seeks are not covered by the policy and that it should not be estopped from denying coverage.

Afternoon Session

PEOPLE v. KNIGHT (case no. 124996)
Prosecuting attorney: Thomas M. Chambers/(313) 224-5749
Attorney for defendant Jerome L. Knight: Gerald M. Lorence/(313) 961-9055
PEOPLE v. RICE (case no. 125101)
Prosecuting attorney: Thomas M. Chambers/(313) 224-5749
Attorney for defendant Gregory M. Rice: Neil J. Leithauser/(248) 545-2900
Trial court: Wayne County Circuit Court
At issue: Did the prosecutor violate the state and federal equal protection clauses by removing African-American jurors from the jury? Did jury selection violate *Batson v Kentucky*, 476 US

79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), and *Miller-El v Cockrell*, 537 US 322; 123 S Ct 1029; 154 L Ed 2d 931 (2003)?
Background: Jerome Knight was accused of hiring Gregory Rice to kill the mother of Knight's son. Knight and Rice were convicted of first-degree murder in a joint jury trial, and Rice was also convicted of possessing a firearm in the commission of a felony. During jury section, both defense attorneys objected to a number of the prosecutor's peremptory challenges of African-American jurors, claiming that the jurors were being excluded solely on the basis of race in violation of *Batson*. The prosecutor explained why various jurors were removed from the jury, but the trial court was not satisfied with the prosecutor's stated reasons for challenging two jurors. The judge ordered the courtroom deputy to bring those two jurors back into the courtroom, but the deputy was unable to locate them. The judge then concluded that any *Batson* error was cured by the fact that there were still African-American jurors on the panel. On appeal, the defendants argued that the jury selection process violated their constitutional rights. The Court of Appeals affirmed the defendants' convictions. The Supreme Court vacated that ruling, and asked the Court of Appeals to reconsider in light of the United States Supreme Court's recent *Miller-El* decision; on remand, the Court of Appeals again affirmed. The Supreme Court has granted leave to appeal to consider whether the defendants' constitutional rights were violated.

COUNTY ROAD ASSOCIATION OF MICHIGAN, et al. v. GOVERNOR OF MICHIGAN, et al. (case no. 125665)
Attorney for plaintiffs County Road Association of Michigan and Chippewa County Road Commission: Michael C. Levine/(517) 482-5800
Attorney for intervening plaintiffs Michigan Public Transit Association, Ann Arbor Transportation Authority, Capital Area Transportation Authority, and Suburban Mobility Authority for Regional Transportation: John D. Pirich/(517) 377-0712
Attorney for defendants Governor of Michigan, Director of the Department of Transportation, et al.: Patrick F. Isom/(517) 373-1479
Attorney for amicus curiae Michigan Municipal League: Mary Massaron Ross/(313) 983-4801
Attorney for amicus curiae Michigan Road Builders Association and Associated Underground Contractors: Ronald W. Bloomberg/(517) 482-2400
Trial court: Ingham County Circuit Court
At issue: County road associations challenge the Governor's authority to reduce $12,750,000 of expenditures by the Comprehensive Transportation Fund ("CTF") as part of a budget reduction and balancing effort in 2001. Did the Governor's action violate the Michigan Constitution?
Background: Michigan is required to have a balanced budget, and the state Constitution authorizes the Governor to reduce expenditures when revenues fall below expectations. Const 1963, art 5, § 20. The Governor is not allowed to reduce expenditures of "funds constitutionally dedicated for specific purposes." Const 1963, art 5, § 20. This case involves the authority of Governor John Engler, in Executive Order 2001-9, to reduce expenditures by the CTF by $12,750,000 for the fiscal year ending September 30, 2002, and to transfer those funds to the state's general fund. The CTF is primarily a funding mechanism for bus systems and other forms of mass transit. Its funding derives from a clause in the third paragraph of Const 1963, art 9, § 9, which earmarks the revenue from certain taxes for "highway" or "transportation" purposes. The plaintiffs and intervening plaintiffs challenged Engler's reduction of the CTF's expenditures. The

trial court concluded that the CTF's funding was "constitutionally dedicated" by Const 1963, art 9, § 9, and immune from the Governor's power to reduce expenditures under Const 1963, art 5, § 20. On December 11, 2002, the trial court enjoined the reduction in CTF spending and the transfer of CTF funds provided for by the Executive Order. The Court of Appeals reversed, concluding that the Constitution does not "dedicate" any portion of general sales tax revenue to the CTF. The intervening plaintiffs seek leave to appeal to the Supreme Court.

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